

STATE OF MICHIGAN  
IN THE SUPREME COURT

LANZO CONSTRUCTION COMPANY,

Docket No. 130992

*Plaintiff-Appellant,*

v

Court of Appeals No. 264165

WAYNE STEEL ERECTORS, a Michigan  
Corporation,

Wayne County Circuit Court  
No. 04-408824 CK

*Defendant-Appellee.*

**PLAINTIFF-APPELLANT LANZO CONSTRUCTION COMPANY'S  
SUPPLEMENTAL BRIEF IN SUPPORT OF ITS APPLICATION  
FOR LEAVE TO APPEAL, PER 9/15/06 ORDER  
GRANTING ORAL ARGUMENT**

NOREEN L. SLANK (P31964)  
*Attorneys for Plaintiff-Appellant*  
4000 Town Center, Suite 909  
Southfield, Michigan 48075  
(248) 355-4141

MICHAEL F. SCHMIDT (P25213)  
*Attorney for Defendant-Appellee*  
1050 Wilshire Drive, Suite 320  
Troy, MI 48084-1526  
(248) 649-7800

**FILED**

OCT 13 2006

CORBIN R. DAVIS  
CLERK  
MICHIGAN SUPREME COURT

130992  
Suppl

# TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	iii
STATEMENT OF JURISDICTION.....	v
STATEMENT OF QUESTIONS PRESENTED.....	vi
SUPPLEMENTAL STATEMENT OF FACTS.....	1
STATEMENT OF STANDARD OF REVIEW.....	6
ARGUMENT.....	6
Lanzo is entitled to indemnity if Agueros' alleged injuries were not caused by Lanzo's sole negligence. One can be found negligent as a matter of law if the evidence presented is such that no reasonable person could conclude otherwise. Agueros' un rebutted testimony leaves no reasonable conclusion but that he was at least partially negligent. Lanzo, not Wayne Steel, was entitled to summary disposition. ....	6
<i>Wayne Steel has not presented evidence to rebut Agueros' admissions, or at the very least, there is a question of fact regarding Agueros' negligence that makes summary disposition in Wayne Steel's favor inappropriate</i> .....	7
<i>Alternatively, Agueros is comparatively negligent as a matter of law</i> .....	9
<i>Contrary to Wayne Steel's assertions, this case does not present a question of collateral estoppel</i> .....	14
<i>Conclusion</i> .....	19
RELIEF REQUESTED.....	20
EXHIBIT	

**TAB 1**      *Coble v Green*

## INDEX OF AUTHORITIES

### *Cases*

<i>Alyas v Gillard</i> , 180 Mich App 154; 446 NW2d 610 (1989) .....	17
<i>Ashley v Kilborn</i> , 333 Mich 283; 52 NW2d 528 (1952) .....	10
<i>Blankertz v Mack &amp; Co</i> , 263 Mich 527; 248 NW 889 (1933) .....	12
<i>Bullis v Michigan Assoc Tel Co</i> , 333 Mich 85; 52 NW2d 608 (1952) .....	11
<i>Coble v Green</i> , ___ Mich App ___ (2006) .....	12
<i>Davidson v Detroit</i> , 307 Mich 420; 12 NW2d 413 (1943) .....	10
<i>Detroit Edison Co v Michigan Mut Ins Co</i> , 102 Mich App 136; 301 NW2d 832 (1980) .....	17
<i>Elliot v Casualty Ass'n of America</i> , 254 Mich 282; 236 NW 782 (1931) .....	17
<i>Fishchbach-Natkin Co v Power Process Piping, Inc</i> , 157 Mich App 448; 403 NW2d 569 (1987) .....	16
<i>Grand Trunk W RR, Inc v Auto Warehousing Co</i> , 262 Mich App 345; 686 NW2d 756 (2004) .....	15, 16, 17, 18
<i>Haley v Grosse Ile Rapid Transit Co</i> , 290 Mich 373; 287 NW 536 (1939) .....	11
<i>Hett v Duffy</i> , 346 Mich 456; 78 NW2d 284 (1956) .....	9, 10
<i>Jones v Michigan Racing Assoc</i> , 346 Mich 648; 78 NW2d 566 (1956) .....	11
<i>Kowalczyk v Detroit &amp; Mackinac R Co</i> , 335 Mich 220; 55 NW2d 805 (1952) .....	11

<i>Laier v Kitchen</i> , 266 Mich App 482; 702 NW2d 199 (2005) .....	9
<i>Letcher v Robinson</i> , 340 Mich 350; 65 NW2d 799 (1954) .....	10
<i>Maiden v Rozwood</i> , 461 Mich 109; 597 NW2d 817 (1999); MCR 2.116(G)(4) .....	7
<i>Malone v Vining</i> , 313 Mich 315; 21 NW2d 144 (1946) .....	11
<i>Nabozny v Hamil</i> , 361 Mich 544; 106 NW2d 230 (1960) .....	12
<i>Neal v Cities Service Oil Co</i> , 306 Mich 605; 11 NW2d 259 (1943) .....	11
<i>Nowicki v Suddeth</i> , 7 Mich App 503; 152 NW2d 33 (1967) .....	12
<i>Pentz v Wetsman</i> , 269 Mich 496; 257 NW 735 (1934) .....	12
<i>Schmid v Morehead</i> , 333 Mich 611; 53 NW2d 570 (1952) .....	10
<i>Sherman v DeMaria Bldg Co, Inc</i> , 203 Mich App 593; 513 NW2d 187 (1994) .....	6, 7, 17, 18
<i>Shumko v Center</i> , 363 Mich 504; 109 NW2d 854 (1961) .....	9
<i>Smit v State Farm Ins</i> , 207 Mich App 674; 525 NW2d 528 (1994) .....	18
 <b><i>Statutes</i></b>	
MCL 691.991 .....	1, 6, 7, 8, 9
 <b><i>Rules</i></b>	
MCR 7.302(G) .....	1

## STATEMENT OF JURISDICTION

Plaintiff Lanzo Construction Company incorporates the statement of jurisdiction from its Application for Leave to Appeal.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

## STATEMENT OF QUESTIONS PRESENTED

Plaintiff Lanzo Construction Company incorporates the statement of questions presented from its Application for Leave to Appeal.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

## SUPPLEMENTAL STATEMENT OF FACTS

Plaintiff Lanzo Construction Company incorporates the statement of facts from its Application for Leave to Appeal. In addition, on September 15, 2006, this Court issued an order directing the Clerk to schedule oral argument under MCR 7.302(G). That order also directed that the parties may file supplemental, non-redundant briefs within 28 days. This brief is submitted timely under that order. It examines the issues that this Court directed the parties to address at oral argument: “(1) the admission by Fernando Agueros at his deposition that he misjudged the distance to the column when he swung around the rebar that he was carrying and the leading ends of the rebar struck the column, causing his fall; and (2) whether that admission establishes that Agueros was negligent, such that the accident was not the result of the sole negligence of the plaintiff, thereby rendering MCL 691.991 inapplicable.” An additional discussion of the facts relevant to these issues is set forth below.

The issue here is not, as Wayne Steel’s answer suggests, whether Lanzo is negligent, but whether Lanzo is *solely* negligent. If Agueros is comparatively negligent, then Lanzo cannot have been solely negligent, and Lanzo would be entitled to contractual indemnity from Wayne Steel.

In its answer to Lanzo’s Application for Leave to Appeal, Wayne Steel claims that Agueros “was off balance from stepping over debris, when the re-bar came in contact with the column.”<sup>1</sup> Agueros’ own account of the incident, however, tells a much different story.<sup>2</sup> Agueros explained that it was the re-bar striking the column that threw him off balance, and not, as Wayne Steel asserts, stepping over debris:

Q. As you’re swinging the re-bar around, that’s when it hits--

---

<sup>1</sup> Wayne Steel’s Brief in Opposition to Lanzo’s Application for Leave to Appeal, p 5.

<sup>2</sup> Tellingly, Wayne Steel does not offer a record citation for its claim that Agueros lost his balance stepping over debris.

A. The column.

Q. The column?

A. Correct.

Q. You weren't expecting it to hit the column?

A. No.

Q. That surprised you, right?

A. Correct.

Q. *That threw you off balance?*

A. *Correct.*

\* \* \*

Q. *The thing that caused you to lose your balance was striking the re-bar on the column;* would you agree with that?

A. I would agree that had something to do with it.

\* \* \*

Q. And the thing that caused you to lose your balance then was *swinging the re-bar in to the column as opposed to falling on something on the ground?*

A. *Correct.*<sup>[3]</sup>

And contrary to Wayne Steel's (unsupported) assertion that he was "off balance from stepping over debris," Agueros plainly admitted that debris on the ground played *no part in the way he was walking when he struck the column*:

Q. When you went to swing the re-bar off your shoulder and you hit the column, *you didn't change the way you walked because of any debris on the floor*, did you?

A. No. Like I said, I took that path and that was the path that I took. So I pretty much, those passes that I made were, you know, the same ones.

<sup>3</sup> Agueros Deposition, Tab L to Application for Leave to Appeal, pp 83, 84-85, 85-86.

Q. When you got to the point where you're swinging the rebar off your shoulder, you hit the column and you jerk it forward, *you didn't change your path because of anything on the ground*, did you?

A. No.<sup>[4]</sup>

Agueros did not lose his balance because he stepped on something, and he did not need to change how he walked because of anything that was on the ground. As Agueros admitted in the testimony quoted above, the *only* thing that caused him to lose his balance was striking the column with the re-bar he was carrying, and that he only did that because he "miscalculated" how much room he had to swing the load:

Q. You didn't see the column there as you're swinging the re-bar down?

A. I seen that it was there but I, you know, actually it was such to where I did it so many times, *I just miscalculated it*, you know, how much room I had, actually had, you know.<sup>[5]</sup>

Agueros said that when he struck the column with the rebar, "it kind of like jolted me" and he began falling backwards because of the jolt, which in turn was caused by Agueros' admitted "miscalculation," and not because of any debris on the floor.<sup>6</sup>

And contrary to Wayne Steel's assertion that Agueros had to choose the path he walked because of debris, Agueros said that he chose his path because it was "quickest"<sup>7</sup> and that the path was "constantly moving" and changing<sup>8</sup> depending on which side of the re-bar pile he took his loads from:

Q. How many trips after break did you move before your incident occurred?

<sup>4</sup> *Id.*, pp 101-102 (emphasis added).

<sup>5</sup> *Id.*, pp 87-88 (emphasis added).

<sup>6</sup> *Id.*, p 75.

<sup>7</sup> *Id.*, p 81.

<sup>8</sup> *Id.*, pp 78-79.

A. It was right after coffee, so not many. I can say, I cannot give you an exact amount, but I can say maybe five.

Q. So you had done somewhere between ten and fifteen trips then from the new pile of re-bar up to the point that your incident occurred, five to ten before coffee and five or so after, right?

MR. FAKOURY [Agueros' counsel]: He didn't say the same path.

[Agueros]: Yeah, right. *Because the path starts to change* once, because you're starting at one end, going towards the other.<sup>9</sup>

Wayne Steel's only basis for its position that Lanzo was solely negligent is its erroneous assertion that Agueros "did not choose the path" and that "it was the debris [that] forc[ed] him to take the path and lose his balance."<sup>10</sup> As discussed above, however, Agueros' testimony says exactly the opposite.

Agueros' deposition testimony, in fact, is consistent with the admission he made at his settlement hearing:

Q. You're asking the Court to approve the settlement in this case?

A. Yes.

Q. And isn't it true that *you may have been partially at fault* for this accident?

A. *Yes.*<sup>11</sup>

Lanzo's counsel then asked whether this admission was made "freely and voluntarily," to which Agueros, under oath and in open court, replied that it was:

MR. KUDLA: Just one question of Mr. Agueros. Mr. Agueros *the admission you made with regard to your comparative negligence* in this case was done freely and voluntarily?

<sup>9</sup> *Id.*, pp 78-79.

<sup>10</sup> Wayne Steel's Brief in Opposition, p 6.

<sup>11</sup> Settlement Hearing Transcript, Tab K to Application for Leave to Appeal, p 6.

A. Yes.<sup>[12]</sup>

Despite this statement, made under oath in open court, Wayne Steel incredibly made the assertion, without any evidence whatsoever, that Agueros was coerced into making these admissions.<sup>13</sup> Perhaps more incredibly, the Court of Appeals accepted this totally unsupported allegation as a basis for ignoring Agueros' admissions:

In support of its motion for summary disposition, plaintiff also attached the transcript from the settlement hearing in the underlying case in which the underlying plaintiff admitted that he may have been partially at fault for the accident. We find that this transcript does not establish a genuine issue of material fact because *it was motivated by the underlying plaintiff's desire to reach a settlement with plaintiff in that case* and because it specifically contradicts his deposition testimony that plaintiff was the only liable party.<sup>[14]</sup>

Wayne Steel's counsel, attorney Eric Reed, was present at the settlement hearing. Indeed, Reed was not simply content to be present at the hearing, but rather, he made a statement expressing Wayne Steel's refusal to participate in the settlement:

MR. REED: Eric Reed, I was invited by both Mr. Fakhoury and Mr. Kudla to attend the settlement conference and actually made arrangements with your chambers to see if that was the court's pleasure and did appear and Wayne Steel is not contributing in any shape or form to the settlement.<sup>[15]</sup>

Reed also announced that Wayne Steel was "not making any representations as to the reasonableness of this settlement."<sup>16</sup> But despite the fact that Wayne Steel now seems convinced that Agueros' statements were coerced, Reed did not take the opportunity to question Agueros, nor did he even voice such suspicions on the record.

---

<sup>12</sup> *Id.*, p 7.

<sup>13</sup> See, e.g., Wayne Steel's Answer to Lanzo's Application for Leave, pp 29-30, 46. Wayne Steel characterizes Agueros' admission as "coerced" and writes of Lanzo allegedly "coercing" the admission; see also Wayne Steel's Court of Appeals brief, p 25.

<sup>14</sup> Court of Appeals Opinion, slip op, p 4 (emphasis added), Tab A to Application for Leave to Appeal.

<sup>15</sup> *Id.*, pp 6-7.

<sup>16</sup> *Id.*, p 7.

Wayne Steel did not present any evidence to rebut the Lanzo's evidence of Agueros' negligence. Instead, Wayne Steel presented a significant amount of evidence and argument that would, if true, show that *Lanzo* was negligent without negating a finding that Agueros was *also* negligent.

## STATEMENT OF STANDARD OF REVIEW

Plaintiff Lanzo Construction Company incorporates the statement of standard of review from its Application for Leave to Appeal.

## ARGUMENT

**Lanzo is entitled to indemnity if Agueros' alleged injuries were not caused by Lanzo's *sole* negligence. One can be found negligent as a matter of law if the evidence presented is such that no reasonable person could conclude otherwise. Agueros' un rebutted testimony leaves no reasonable conclusion but that he was at least partially negligent. Lanzo, not Wayne Steel, was entitled to summary disposition.**

Wayne Steel strenuously argues about Lanzo's alleged negligence. Lanzo does not concede that it was negligent. But the question of Lanzo's negligence is not the issue here. It is not necessary for Lanzo to be free of negligence in order to trigger Wayne Steel's duty to indemnify Lanzo. MCL 691.991 is not violated unless an indemnitee (Lanzo) seeks indemnification for damages caused by the indemnitee's *sole* negligence. *Sherman v DeMaria Bldg Co, Inc*, 203 Mich App 593, 600-602; 513 NW2d 187 (1994). The comparative negligence of a plaintiff in the underlying case – or even merely “allegations of comparative negligence” – for which the indemnitee seeks negligence is sufficient to negate the statutory sole negligence exclusion. *Id.*

In other words, Wayne Steel's attempt to rebut Lanzo's evidence of Agueros' comparative negligence by proving that Lanzo was negligent does not do anything to defeat

Lanzo's claim for indemnity. Indeed, it would be enough to clear the sole negligence hurdle for Lanzo to convince that Agueros was only 0.1% comparatively negligent. Lanzo would be entitled to indemnity even if Lanzo was hypothetically found to be 99.9% negligent, so long as Lanzo was not found to be 100% at fault.

***Wayne Steel has not presented evidence to rebut Agueros' admissions, or at the very least, there is a question of fact regarding Agueros' negligence that makes summary disposition in Wayne Steel's favor inappropriate***

In response to a motion for summary disposition, the non-moving party may not rest upon speculation or general denials, but must produce admissible evidence of specific facts showing that there is a genuine issue for trial. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); MCR 2.116(G)(4). Throughout the proceedings, Lanzo has presented evidence of Agueros' many admissions that it was *his own actions*, and not debris on the floor, that (in part) caused him to strike the column with his re-bar bundle and fall. Even though Agueros believed the railing and the path to be unsafe, and even though he could have refused to work if he believed the conditions were dangerous, Agueros nevertheless proceeded on what Wayne Steel now claims was a treacherous path. Most significantly, Agueros described (and admitted) how he swung his heavy pile of re-bar around without correctly judging whether he had enough room to safely do so. In addition to his deposition testimony, Agueros admitted in open court, on the record, that he was at least partially at fault for his own injuries. Lanzo's *evidence* shows that Agueros was indeed at least partially at fault.

In response, Wayne Steel only presented evidence and argument that it says shows Lanzo to be negligent. But Lanzo need not be free of negligence in order to avoid the statutory exclusion under MCL 691.991; rather, Lanzo only needs to show it was not *solely* negligent. *Sherman, supra*. Wayne Steel presented *no evidence* that contradicts Agueros' own admissions, made during his deposition and on the record in open court. Instead, Wayne Steel

mischaracterizes his testimony, claiming that he lost his balance because of debris on the floor when in fact Agueros clearly said that he did not walk any differently because of debris, and that he lost his balance only after miscalculating where the column was in relation to the re-bar he was carrying. Wayne Steel's evidence did not rebut Lanzo's evidence that Agueros was negligent, but rather, only tended to show Lanzo's negligence. In other words, the evidence the parties presented only supported a finding that *both* Lanzo and Agueros were negligent.<sup>17</sup> But under the subcontract's indemnity provision and MCL 691.991, Lanzo is still entitled to indemnity if *both* it and Agueros were negligent, so long as Lanzo is not the *sole* negligent party.

At the very least, Lanzo has clearly presented enough evidence to raise a question of fact on the issue of Agueros' comparative negligence and whether Lanzo was solely negligent. But despite the significant amount of evidence of Agueros' own negligence, the trial court nevertheless concluded that there was no evidence of Agueros' comparative negligence. The Court of Appeals made a finding of fact *and* clearly weighed credibility when it, without any evidence, determined that Agueros only made the admission in his settlement hearing because he was supposedly motivated to lie in order to secure his settlement.<sup>18</sup>

The grant of summary disposition in Wayne Steel's favor was wholly inappropriate because Wayne Steel presented no evidence that would show Agueros was free of negligence (and thus that Lanzo was solely negligent) and because there was, in the alternative, at least a question of fact on this issue.

---

<sup>17</sup> Wayne Steel has simply refused to join issue with Lanzo. It is as though Lanzo asserted that the "sky is blue" and Wayne Steel replied by presenting evidence that "dogs bark." The latter does nothing to negate the former, and Wayne Steel's assertions that Lanzo was negligent does nothing to negate Lanzo's assertions that even if Lanzo was negligent, Agueros was *also* negligent.

<sup>18</sup> Remember that Wayne Steel's counsel was present and made a statement on the record, but made no assertion that Agueros was being coerced, and asked no questions of Agueros whatsoever.

*Alternatively, Agueros is comparatively negligent as a matter of law*

Lanzo acknowledges that, in most cases, the issue of whether one has acted with negligence or comparative negligence is a question for the jury.<sup>19</sup> See *Laier v Kitchen*, 266 Mich App 482, 495; 702 NW2d 199 (2005). Michigan courts have, however, found parties negligent and comparatively negligent as a matter of law when the facts were such that no reasonable trier of fact could conclude otherwise. *Shumko v Center*, 363 Mich 504; 109 NW2d 854 (1961); *Hett v Duffy*, 346 Mich 456; 78 NW2d 284 (1956). This is one such case.

In *Shumko, supra*, this Court affirmed the ruling of the trial court that the plaintiff was contributorily negligent as a matter of law. The plaintiff pedestrian was struck by the driver's car after the plaintiff began crossing the road without looking both ways. The trial court, granting judgment notwithstanding the jury's verdict, ruled that plaintiff was contributorily negligent as a matter of law, stating "I cannot perceive how reasonable men could have found otherwise than that plaintiff was contributorily negligent under this state of facts, laying aside the question of defendant's negligence as to observation or control of his vehicle." *Shumko, supra* at 511. This Court agreed, holding that "[w]e are in accord with the conclusion reached by the trial judge with reference to the contributory negligence of the plaintiff." *Id.* After a thorough discussion of the facts of the case, including the plaintiff's own testimony, this Court concluded that "[w]e cannot avoid the conclusion that a person exercising due and proper care for his own safety would either have returned to the edge of the pavement or have made timely observations of possible traffic from the north." *Id.* at 510. This Court, having reviewed all of the evidence, concluded, as a matter of law, that no reasonable fact finder could reach any other

---

<sup>19</sup> Lanzo argued in its application for leave to appeal, p 18, both that Lanzo was entitled to summary disposition on this point and, in the alternative, that Wayne Steel is not because there is, at minimum, a question of fact. Because this Court has asked the parties to focus on the effect of Agueros' deposition admission, this brief focuses primarily on the grounds for finding that Agueros' testimony "establishes that Agueros was negligent, such that the accident was not the result of the sole negligence of [Lanzo], thereby rendering MCL 691.991 inapplicable." See this Court's September 15, 2006 Order Directing Oral Argument on the Application.

conclusion but that the plaintiff was negligent because he did not take adequate steps to protect his own safety.

*Hett, supra*, also involved a pedestrian trying to cross the street before looking to see whether traffic was coming. The jury found in favor of the plaintiff, and the defendants moved unsuccessfully for a directed verdict, a new trial, or judgment notwithstanding the verdict. This Court, after reviewing evidence, concluded that, despite plaintiff's claims to the contrary, the decedent "could, and should, have seen the defendants' automobile approaching him. It would have been . . . within the decedent's plain sight for over 400 feet, if he had looked." *Id.* at 459. This Court further stressed that "if plaintiff's decedent had looked and seen the defendants' approaching automobile, he could, and should, have stopped as he started across the western lanes of Southfield . . . and then he would not have been struck when he continued to cross in front of defendants' automobile." *Id.* at 459-460. Having so concluded, this Court held that the trial court should have granted either the defendants' motion for a directed verdict or for judgment notwithstanding the verdict. *Id.* at 460. This Court therefore *reversed the jury verdict* and *remanded for entry of a judgment of no cause of action*, given the decedent's contributory negligence.

This Court has not hesitated to find parties contributorily negligent in a host of other cases involving people who got hit by vehicles because they either did not look both ways before crossing the street, or crossed the street even after seeing the oncoming vehicle, and unreasonably disregarded the risk of being hit. See, e.g., *Letcher v Robinson*, 340 Mich 350; 65 NW2d 799 (1954); *Schmid v Morehead*, 333 Mich 611; 53 NW2d 570 (1952) and *Davidson v Detroit*, 307 Mich 420; 12 NW2d 413 (1943) ("A reasonably prudent man will not take a chance of streetcars slowing up to let him cross the street."); *Ashley v Kilborn*, 333 Mich 283; 52 NW2d 528 (1952) (jury verdict reversed after this Court held that the trial court should have granted defendant a directed verdict because plaintiff was contributorily negligent for not

looking both ways before crossing the street); *Malone v Vining*, 313 Mich 315; 21 NW2d 144 (1946) (pedestrian contributorily negligent for stepping into oncoming traffic and misjudging the speed and distance of oncoming car); *Haley v Grosse Ile Rapid Transit Co*, 290 Mich 373; 287 NW 536 (1939) (though accident could have been avoided if bus driver stepped on the brakes, plaintiff's decedent was contributorily negligent as a matter of law because the accident also could have been avoided if the decedent had not stepped into the road in front of the bus).

This Court has also found plaintiff drivers contributorily negligent as a matter of law for driving into intersections without adequately looking to see if the way was clear, *Bullis v Michigan Assoc Tel Co*, 333 Mich 85; 52 NW2d 608 (1952), or for driving across railroad tracks in spite of flashing warning lights and the sound of the approaching train and its horn, *Kowalczyk v Detroit & Mackinac R Co*, 335 Mich 220; 55 NW2d 805 (1952).

This Court has routinely found comparative negligence as a matter of law in many situations where plaintiffs did not take reasonable steps to ensure their own safety. This Court affirmed a trial court's grant of the defendant's motion for judgment notwithstanding the verdict where the plaintiff admitted that he knew a large puddle at defendant's racetrack was dangerous because of discarded betting tickets that had become wet and slippery. *Jones v Michigan Racing Assoc*, 346 Mich 648; 78 NW2d 566 (1956). The plaintiff decided to try to jump across the puddle anyway and landed in the middle, slipping and falling on the wet, discarded tickets. Stressing that "one going about in public places or semipublic places when possessed of his natural faculties may not escape being charged with negligence if he is heedless of his own safety," *id.* at 651, this Court held that the plaintiff was contributorily negligent for knowing of the danger presented by the puddle and jumping anyway, *id.* at 654. See also, *Neal v Cities Service Oil Co*, 306 Mich 605; 11 NW2d 259 (1943) (plaintiff contributorily negligent as a matter of law where he knew of the existence of a trap door, but in a moment of carelessness, walked backwards into it); *Pentz v Wetsman*, 269 Mich 496; 257

NW 735 (1934) (decedent contributorily negligent as a matter of law for walking backwards into a trap door without seeing whether it was safe to do so); *Blankertz v Mack & Co*, 263 Mich 527; 248 NW 889 (1933) (plaintiff contributorily negligent as a matter of law for walking into elevator shaft without looking to see whether the elevator platform was present).

Michigan courts have not limited themselves to deciding that *plaintiffs* were negligent as a matter of law. In *Nabozny v Hamil*, 361 Mich 544; 106 NW2d 230 (1960), this Court affirmed the trial court's ruling that the defendant was negligent as a matter of law. In *Nabozny*, the plaintiff delivery truck driver parallel parked his truck at one of his stops when the defendant pulled up behind him to drop her son off at a barber shop. The defendant's son did not close his door behind him, and the defendant reached over to close it. In doing so, her foot slipped from the brake pedal to the gas pedal, and the car was still in gear. The car shot forward and slammed into the delivery truck, then bounced back and sped forward again. The impact caused the plaintiff, who was standing in the truck, to be thrown back and forth, and sustain injury. The defendant admitted to these facts, and to being cited for driving without due care and caution. The trial court granted a directed verdict, ruling that plaintiff was negligent as a matter of law. This Court, noting that "generally the question of negligence is a question of fact for the jury," held that "[o]n this record, however, we believe there were no facts in dispute and the negligence of defendant was crystal clear." *Id.* at 568; see also *Nowicki v Suddeth*, 7 Mich App 503; 152 NW2d 33 (1967) (defendant was negligent as a matter of law where she admitted driving into an intersection without looking to see whether it was clear).

The Court of Appeals has also affirmed the trial court's ruling that a lawyer who did not pursue his client's appeal was negligent as a matter of law. *Coble v Green*, \_\_\_ Mich App \_\_\_ (2006).<sup>20</sup> The plaintiff hired the defendant lawyer to represent him in a paternity action.

<sup>20</sup> Though this case was issued for publication by the Court of Appeals, it has yet to be assigned a volume and page citation. A copy is attached at *Tab 1*.

Plaintiff was ordered to pay child support even though the child's mother's ex-husband had been named the child's equitable parent and ordered to pay child support. Plaintiff paid defendant \$500 to pursue an appeal. But the defendant failed to timely file a claim of appeal, and instead had to file a delayed application for leave to appeal to the Court of Appeals. The delayed application was dismissed after the lawyer failed to timely file a docketing statement, ignored the court's warnings that the appeal would be dismissed, and failed to pay the fines imposed by the court for failure to file the docketing statement. The defendant did not tell the plaintiff that the appeal had been dismissed, thus preventing the plaintiff from being able to reinstate the appeal or to take action in this Court.

The Court of Appeals held as a matter of law that the plaintiff would have succeeded in the underlying appeal because another man had been named the equitable parent of the child, and that status, once it attaches, is permanent. Accordingly, the court held as a matter of law that the plaintiff should never have been ordered to pay child support. The court therefore held that the trial court had properly ruled, as a matter of law, that the defendant was negligent and that his negligence caused the plaintiff's damages. *Id.*

Here, Agueros' testimony shows that the only thing that caused him to lose his balance was striking a column with re-bar after he miscalculated the amount of maneuvering room he had. Despite Wayne Steel's claims to the contrary, Agueros specifically said that he did not fall because of debris on the floor, and in fact, that he did not even need to change how he walked as the result the alleged debris on the floor. And though Agueros said he believed the railing along the walkway to be unsafe,<sup>21</sup> and though he knew that he could therefore refuse to work, he nevertheless continued to work anyway. Given that Agueros allegedly believed the workplace was unsafe and that he could therefore refuse to work, and primarily because he

---

<sup>21</sup> He also admitted, however, that he did not know whether the railing complied with MIOSHA safety regulations. Agueros Deposition, Tab L to the Application for Leave to Appeal, pp 130-131.

attributed his fall to striking a column with re-bar after making a miscalculation as to how much room he had, a reasonable fact finder could only conclude that Agueros did not take reasonable care to ensure his own safety. When this Court studies Agueros' testimony and the surrounding facts of the underlying case, the conclusion is clear: Agueros was comparatively negligent.

In its application for leave to appeal, Lanzo argued that it was the only party entitled to summary disposition.<sup>22</sup> However, it also argued that granting Wayne Steel's summary disposition motion dishonored the jury's role in terms of resolving fact questions about Lanzo's sole negligence. Lanzo urging *its* entitlement to summary disposition is not inconsistent with the jury's proper role in this case. Lanzo has created a record showing Agueros' negligence. This record is in stark contrast to Wayne Steel's stubborn preoccupation with Lanzo's own alleged negligence.

Granting summary disposition to Wayne Steel disrespects the jury's proper role. But granting summary disposition to Lanzo is the only result consistent with Michigan's established rules of summary disposition practice. In addition, Agueros' actions (as well as his words) "scream" negligence and empower this Court to so rule, as a matter of law. And although Wayne Steel persists in "screaming" about Lanzo's alleged negligence, that does absolutely nothing to negate (or raise any fact issue about ) Agueros' negligence.

***Contrary to Wayne Steel's assertions, this case does not present a question of collateral estoppel***

In the contractual indemnity context, an indemnitor (such as Wayne Steel) who refuses a tender of defense of a lawsuit by the indemnitee (here, Lanzo) cannot be heard to argue that the indemnitor should not be bound by a settlement because it did not litigate the issues in the underlying matter. *Grand Trunk W RR, Inc v Auto Warehousing Co*, 262 Mich App 345; 686

---

<sup>22</sup> Application, p 18.

NW2d 756 (2004). That is the gist of Lanzo's argument that it is not "bound" by the Agueros-admitted fact of his comparative fault. Where an indemnitor refuses a tender of defense, it is bound by any reasonable settlement so long as the indemnitee can show mere *potential* (not actual) liability for the underlying claim. The binding effect of the underlying settlement is a consequence of the indemnitor's refusal to fulfill its contractual duty to defend the indemnitee, rather than being premised on a theory of collateral estoppel. Indeed, the indemnitor is not absolutely bound by the existence of the settlement, insofar as the indemnitor may still attempt to prove that the settlement was not reasonable, or that the indemnitee had no potential liability to the underlying plaintiff. *Id.* at 358.

In *Grand Trunk, supra*, the trial court granted summary disposition to the plaintiff Grand Trunk Western Railroad, who was the indemnitee in a contract with defendant Auto Warehousing Company, the indemnitor. In the contract, Auto Warehousing promised to indemnify and defend Auto Warehousing for any injuries sustained on property leased by Auto Warehousing, except those caused by the sole negligence of Grand Trunk and/or its employees. Terry Thomas, a Grand Trunk employee, was injured when he slipped and fell on snow and ice on Auto Warehousing's premises. Grand Trunk tendered the defense to Auto Warehousing, which refused to assume Grand Trunk's defense. Grand Trunk then notified Auto Warehousing of its intent to settle the case, and Auto Warehousing refused to participate in the settlement.

The trial court granted summary disposition in favor of Grand Trunk, and entered judgment in favor of Grand Trunk against Auto Warehousing for the amount of the settlement. *Grand Trunk, supra* at 349. The Court of Appeals affirmed. *Id.* at 361. The Court of Appeals "recognize[d] that if [Auto Warehousing] had shown that Thomas's suit would have been successfully defended, [Grand Trunk] may not recover on the indemnity claim. Likewise, if [Auto Warehousing] had shown that Thomas's injuries were caused by the sole negligence of

[Grand Trunk] or Thomas [Grand Trunk's employee], [Grand Trunk] could be precluded from indemnification . . . ." *Id.* at 357-358 (citations omitted). The court held, however, that Auto Warehousing "presented no conclusive evidence in either regard." *Id.* at 358. The Court of Appeals also held that the mere existence of a question of fact as to the sole negligence issue was sufficient to satisfy the potential liability factor and "preclude[] any argument that [Auto Warehousing] had no duty to defend on the basis that there was no liability under the parties' lease." *Id.* The court's holding was not premised on a collateral estoppel principle that the issue was litigated by the settlement. The point was that Auto Warehousing could have litigated, and indeed had the duty to litigate, the underlying case, but it shirked that duty. To have held otherwise would essentially reward obstinate indemnitees who breach their contractual duties.

In *Fishchbach-Natkin Co v Power Process Piping, Inc*, 157 Mich App 448; 403 NW2d 569 (1987), the plaintiff indemnitee, Fishchbach-Natkin Company, was sued by defendant indemnitor Power Process Piping's employee William Green. Fishchbach was the general contractor on a project to install a hydraulic machine at a Ford Motor Company plant, and Power Process was one of Fishchbach's subcontractors. Green sued Fishchbach, and LaSalle Machine Tool Company, the maker of the hydraulic machine, after the machine tipped and fell on him. The Fishchbach-Power Process subcontract contained an indemnity clause and Fishchbach tendered its defense to Power Process. Power Process ignored the tender. Fishchbach then sued it in a separate action seeking indemnity. The jury in the Green lawsuit ultimately found in favor of Green, allocating 25% fault to him, 25% to LaSalle, and 50% to Fishchbach. Having been found negligent by the jury in the underlying case, Fishchbach successfully moved for summary disposition in its indemnity case against Power Process. The Court of Appeals affirmed. *Id.* at 461. Like Wayne Steel here and Auto Warehousing in *Grand Trunk*, Power Process was not a party to the underlying lawsuit for which the

indemnatee sought indemnity. Despite Power Process's absence from the underlying lawsuit, there was no suggestion that principles of collateral estoppel played any role in determining whether Power Process was required to indemnify Fishchbach.

Similarly, in *Sherman, supra*, the trial court granted summary disposition in favor of indemnatee DeMaria Building Company against the indemnitor, Glasco. *Sherman, supra* at 595-596. The order required Glasco to indemnify DeMaria for "any damages assessed against DeMaria in connection with Sherman's injury." *Id.* at 596.

In the related insurance context, cases hold that insurers are "stuck" with the result in an underlying case when the insurer wrongfully refuses to defend and the insured later settles. See, e.g., *Detroit Edison Co v Michigan Mut Ins Co*, 102 Mich App 136, 144; 301 NW2d 832 (1980) ("Where the insurer . . . wrongfully refused to so settle or defend the action, and . . . makes a settlement thereof, he may recover the amount paid on such settlement, unless it is shown that there was in fact no liability, or that the amount paid was excessive"); *Elliot v Casualty Ass'n of America*, 254 Mich 282, 287; 236 NW 782 (1931); *Alyas v Gillard*, 180 Mich App 154, 160; 446 NW2d 610 (1989) ("When an insurer breaches its own policy of insurance by refusing to fulfill its duty to defend the insured, the insurer is bound by any reasonable settlement entered into in good faith between the insured and the third party.").

The absence of any discussion of collateral estoppel in indemnity cases makes sense – indemnity contracts are agreements by indemnitors to indemnify indemnitees for any losses that are incurred. When an indemnatee has judgment entered against it, the indemnitor is bound to pay the judgment not because of collateral estoppel, but rather, because the indemnitor agreed to do so in the contract. The time for an indemnitor to challenge underlying judgments is before they are entered, which is why indemnitees tender defenses to their indemnitors. Indemnitors who wrongly refuse to accept tenders of defense are stuck with whatever losses the indemnitees incur in the underlying action. See *Grand Trunk, supra*.

Here, as discussed above, Wayne Steel has not presented any evidence to show that Lanzo was *solely* negligent. Lanzo, on the other hand, has presented ample evidence that shows Agueros' comparative negligence. Having refused Lanzo's tender of the defense of the Agueros versus Lanzo matter, Wayne Steel's only challenge to the settlement itself is whether Lanzo was potentially liable, and whether the settlement was reasonable. Given Wayne Steel's vigorous attempts to paint Lanzo as the sole party responsible for Agueros' alleged injuries, Wayne Steel cannot reasonably argue that Lanzo was not at least potentially liable.

Cases such as *Fishchbach*, *Grand Trunk*, and *Sherman* make it clear that Lanzo does not need the underlying settlement to have collateral estoppel effect to win here—Wayne Steel is obligated to indemnify Lanzo not because of collateral estoppel, but because Wayne Steel agreed to do so in its contract with Lanzo. Wayne Steel cannot be heard to dispute admissions made in a case it could have, and should have, defended but chose not to. Collateral estoppel simply does not apply. But even if collateral estoppel principles *did* apply, the case law upon which Wayne Steel relies does not apply to exclude the use of Agueros' settlement admission in support of Lanzo's claim for indemnity. The only precedentially binding Court of Appeals case<sup>23</sup> defendant cites in favor of the proposition that consent judgments have no collateral estoppel value is *Smit v State Farm Ins*, 207 Mich App 674, 682; 525 NW2d 528 (1994). In *Smit*, the Court of Appeals explained that collateral estoppel “does not apply to consent judgments *where factual issues are neither tried nor conceded*.” *Id.* Here, as Wayne Steel itself points out,<sup>24</sup> the underlying case did not end in a consent judgment, but instead ended in a settlement in which factual issues *were* conceded on the record, *with Wayne Steel's counsel present*. Specifically, Agueros admitted that he was at least partially responsible for his own injuries.

---

<sup>23</sup> See MCR 7.215(J).

<sup>24</sup> Wayne Steel's Brief in Opposition to Leave, p 48.

And, contrary to Wayne Steel's assertions that "statements as part of a consent judgment have no collateral estoppel effect," none of the cases Wayne Steel cites hold that statements made in connection with a consent judgment cannot be used for other purposes. In particular, nothing in those cases precludes Lanzo from using Agueros' admissions as evidence that Lanzo was not solely negligent in connection with Agueros' alleged injuries. Wayne Steel, in fact, did not present any evidence to contradict these statements. Instead, it made the unsupported assertion that Agueros must have been coerced to lie. Wayne Steel's reliance on collateral estoppel is misplaced and inapplicable here.

### ***Conclusion***

Wayne Steel claims that Lanzo must be solely negligent because Agueros was "forced" to walk through debris, which in turn threw him off balance causing his alleged injury. But Agueros' own deposition testimony establishes that he was not forced to do anything he believed to be unsafe and, further, that the debris did not contribute to his accident. And he clearly stated that his own miscalculation, which led to his swinging the re-bar into a column, caused him to lose balance. Though Wayne Steel has expended a considerable amount of effort presenting evidence of Lanzo's negligence, it has not presented any evidence that rebuts Lanzo's assertions that Agueros was, at the very least, *also* negligent. The trial court thus erred in granting Wayne Steel summary disposition, and the Court of Appeals erred when it affirmed.

## RELIEF REQUESTED

Plaintiff Lanzo Construction Company incorporates the statement of relief requested from its Application for Leave to Appeal.

**COLLINS, EINHORN, FARRELL  
& ULANOFF, P.C.**

By: Noreen L. Slank  
NOREEN L. SLANK (P31964)  
GEOFFREY M. BROWN (P61656)  
*Attorneys for Plaintiff-Appellant*  
4000 Town Center, Suite 909  
Southfield, MI 48075  
(248) 355-4141

Dated: October 12, 2006  
F:\FILES\05\058460\SPC SB.DOC

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141